



**THE ATTORNEY GENERAL
OF TEXAS**

July 18, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Honorable Chet Edwards
Chairman
Nominations Committee
Texas State Senate
P. O. Box 12068
Austin, Texas 78711

Dear Senator Edwards:

Because of the tremendous increase in the volume of requests for opinions and open records decisions, we are responding to your request with the enclosed Letter Opinion or Open Records Ruling. A Letter Opinion or Open Records Ruling has the same force and effect as a formal Attorney General Opinion or Open Records Decision, and represents the opinion of the Attorney General unless and until it is modified or overruled by a subsequent Letter Opinion or Open Records Ruling, a formal Attorney General Opinion or Open Records Decision, or a decision of a court of record.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

J I M M A T T O X
Attorney General of Texas

JAM/er
Enclosure



**THE ATTORNEY GENERAL
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**JIM MATTON
ATTORNEY GENERAL**

Honorable Chet Edwards
Chairman
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P. O. Box 12068
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LO-89-57

Dear Senator Edwards:

You have requested our opinion as to whether the chairperson of the Public Utility Commission may be appointed as its acting executive director. You ask three questions, the first of which centers upon article XVI, section 40, of the Texas Constitution, which prohibits a single individual from holding more than one civil office of emolument. Because we resolve the matter on other grounds, it is unnecessary to reach this constitutional issue.

The common law doctrine of incompatibility prevents one person from holding two different positions under one of two circumstances. In the first of these, the problem is one of "conflicting loyalties." Thus, we have said that the doctrine of incompatibility precludes a trustee of a community college district from simultaneously serving as county commissioner in the county in which the community college district is located. Attorney General Opinion JM-129 (1984). We have also determined that one person may not at the same time serve as county auditor and city councilman of a municipality located within that county. Attorney General Opinion JM-133 (1984). This branch of the doctrine is well established in Texas law. See Thomas v. Abernathy County Line Indep. School Dist., 290 S.W. 152 (Tex. Comm'n App. 1927, opinion adopted) (positions of school trustee and city alderman are incompatible).

The other prong of the doctrine prevents an individual from holding two separate positions in which one is subordinate and accountable to the other. This problem was first addressed by this office in Letter Advisory No. 114 (1975). There, Attorney General Hill, after a thorough examination of the pertinent issues, concluded that

incompatibility prohibits a public school teacher from simultaneously serving as a member of the board of trustees of his or her employing district.

The Attorney General has, in recent years, affirmed this view. In Attorney General Opinion JM-386 (1985), for example, we held that the doctrine of incompatibility bars an alderman of a general law city from serving as a member of that city's police reserve. We based our conclusion on "the city council's supervision and other authority over members of the police reserve force, and the accountability of police reserve force members to the city council."

The legislature, in the nearly 14 years since the issuance of Letter Advisory No. 114, has not adopted legislation changing this "self-employment" aspect of the common law doctrine of incompatibility. Cf. Tax Code § 6.03 (member of a governing body of a taxing unit may serve on the board of directors of an appraisal district). We must conclude that it has been and remains a viable prohibition in Texas law.

Under the terms of the Public Utility Regulatory Act, the three commissioners appointed by the Governor constitute the governing body of the Public Utility Commission and the executive director of the commission is specifically made an employee of the commission. V.T.C.S. art. 1446c, §§ 5, 8(b)(1). There is no question that, as in the situations presented in Attorney General Opinion JM-386 and Letter Advisory No. 114, the commissioners of the Public Utility Commission exercise "supervision and other authority" over the executive director and that the latter is fully accountable to the three commissioners. As a result, we conclude that the chairperson of the Public Utility Commission may not validly be appointed as its acting executive director.

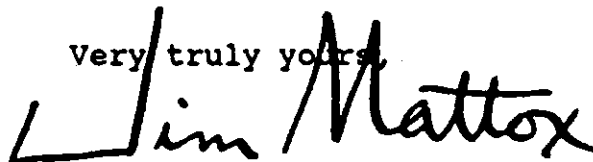
As to the consequences of the proposed action, it is well established that a person who qualifies for and accepts a second office, the holding of which is incompatible with the first, ipso facto relinquishes the first position. Attorney General Opinion MW-170 (1980). In Letter Advisory No. 114, the Attorney General said only that

if a teacher becomes a board member, he must relinquish the inconsistent and incompatible position as a teacher for the district.

The self-employment branch of the doctrine of incompatibility is one which, uniquely among dual office holding prohibitions, applies to a wider class of persons than "officers." Since ipso facto relinquishment is such a harsh and unforgiving rule, and since it has in the past been confined to "offices," we decline to apply it to a situation, as here, in which one of the positions is arguably not an office. Furthermore, it may be unnecessary to reach this issue, since Ehlinger v. Clark, 8 S.W.2d 666 (Tex. 1928), indicates that the kind of appointment purported by the commission is altogether void. In that case, the court held that a commissioners court could not employ the county judge as an attorney in a collection suit because of the incompatibility of being both an appointee and a member of the board making the appointment. The court cited the well-established rule that those "who have the appointing power are disqualified for appointment to the offices to which they may appoint." 8 S.W.2d at 674. See Attorney General Opinions JM-934 (1988); C-452 (1965); O-410 (1939).

We believe that it is sufficient to advise that the common law doctrine of incompatibility absolutely prohibits the simultaneous holding of the two positions of chairperson and acting executive director of the Public Utility Commission.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive, slightly slanted style. The first letter "J" is large and loops around the "i". The "M" is also large and has a distinct loop. The "T" is simple, and the "X" is formed by two intersecting strokes.

J I M M A T T O X
Attorney General of Texas

Prepared by Rick Gilpin
Approved: Opinion Committee

JAM/RG/er

Ref.: ID# 6983